IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 205

WESTERN MARYLAND RAILWAY COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,
Appellees.

BRIEF FOR APPELLANT

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AUTHORITIES CITED

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OPINIONS OF THE LOWER COURTS

The opinion of the lower State Court, the Circuit Court o. 2 of Baltimore City, is not officially reported, but is pub-hed in The Daily Record, Baltimore, Maryland, January 1949.

The opinion of the Court of Appeals of Maryland is re-rted in *Western Maryland Railway Company v. State ax Commission* (1950), 73 Atlantic (2nd) 12.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

A statute of the State of Maryland, which is hereafter quoted (page 3), levies a franchise tax measured by gross receipts upon various business enterprises, including railroads. Appellant, in all the proceedings below, challenged the authority of the State officials charged with administration of the tax, to include gross receipts earned by appellant from the transportation of imports and exports, in the measure of appellant's franchise taxes for the years 1946 and 1947, on the ground that as thus applied the statute imposed a tax on imports and exports forbidden by Article I, Section 10, Clause 2 of the Constitution of the United States. The Court of Appeals of Maryland, which is the highest court of the State (two of six Judges dissenting), sustained the State administrative officials and the lower Court, and held that the statute as so applied was valid and was not in violation of the constitutional provision.

The jurisdiction of the Supreme Court to entertain this appeal is invoked under United States Code, Title 28, Section 1257, on the ground that appellant has drawn in question the constitutionality of the Maryland statute as applied in this case, and the final decision of the courts of the State has been in favor of the validity of the State statute.

STATEMENT OF THE CASE

Appellant, Western Maryland Railway Company, is an interstate common carrier by railroad conducting all the usual business of a Class I railroad company. Its lines extend through the States of Maryland, Pennsylvania and West Virginia, and it serves the seaport City of Baltimore where it maintains extensive piers on the harbor. As a result it transports to and from the port a substantial volume of goods which are moving over its railroad lines in the course

of importation from or exportation to foreign countries (R. 56).

Article 81, Section 95[1] of the Annotated Code of Maryland (1939 Edition) imposes a franchise tax upon railroad companies measured by their gross receipts. An annual report of such receipts is required to be made to the State Tax Commission[2], which is charged with the administration of the tax.[3] In the years 1946 and 1947, appellant, in pursu-

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[1] "95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

(1) All domestic or foreign railroad companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:

One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * *

(b) If any such railroad company has part of its road in this state and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

[2] Article 81, Section 96.

[3] Article 81, Section 97.

ance of the statutory requirement, made its usual report of all of its gross receipts from the transportation of freight and passengers earned in the calendar years 1945 and 1946, as the basis for determination of the franchise tax measured by these gross receipts for the years in which the returns were made (R. 1, 24A). Pursuing the statutory directions[4] the State Tax Commission apportioned these gross receipts to the State of Maryland by the use of a percentage figure representing the relation of the all-track miles of appellant's railroad in the State of Maryland to its system all-track mileage (R. 2-3, 24B-25). The gross receipts so apportioned became the measure of the tax which was then levied at the rates provided for in the statute (R. 4, 28).

Subsequently, after consideration of certain decisions of the United States Supreme Court, the appellant filed with the State Tax Commission of Maryland, protests[5] against inclusion of gross receipts earned from the transportation of freight in the process of importation into and exportation out of the United States, in the measure of the tax, on the ground that this is prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States,[6] forbidding taxation by any State of imports and exports (R. 19, 29). Appellant also filed amended returns for these years

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[4] Article 81, Section 95(b) quoted supra N. 1, page 3.

[5] Appellant's original protest for 1946 (R. 5) was based upon another point which was decided adversely to appellant in State Tax Commission v. Western Maryland Railway Company (1947), 188 Md. 240, involving appeals for the years 1942 to 1944. This original protest was amended (R. 19) to state the Import-Export Clause contention.

[6] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

in which the gross receipts earned in 1945 and 1946 from the transportation of imports and exports were eliminated from the gross receipts reported for use in measuring the taxes for 1946 and 1947, respectively (R. 8A-9, 26A-27).

The State Tax Commission referred appellant's protests to the Attorney General of Maryland, who rendered an opinion (R. 11) in which, after a lengthy review of authorities, he rejected appellant's contention on the ground that the Supreme Court has not indicated "with certainty" (R. 18) that the contention is valid. (Opinion reported in 32 Ops. Attorney General of Maryland 476). Thereafter, a hearing was held before the State Tax Commission at which appellant introduced detailed evidence with respect to the volume and character of its export and import traffic, and identified the amount of its gross revenues earned in this manner. No witnesses appeared for the State and the testimony of appellant's witnesses was neither challenged nor in any manner contradicted. Since these details, which constitute proof that the traffic involved was in fact import and export in character, and of the amount of gross receipts and the consequent tax involved, are not disputed (R. 24, 56) and need therefore not be considered by the Court in deciding this case, they have not been included in the printed record. The State Tax Commission concurred in the opinion expressed by the Attorney General of Maryland and ruled "that protestant's gross receipts taxes for the years 1946 and 1947 as assessed are constitutional" (R. 24).

Because the Maryland statutes[7] provide that appeals from the State Tax Commission shall not operate to stay the collection of taxes (R. 21, 30), and that upon a final determination of such an appeal the taxpayer may have a

[7] Article 81, Section 196, of the Annotated Code of Maryland (1939 Edition).

refund of any taxes paid in excess of the amount properly due, the appellant paid the gross receipts taxes for both years in full, with appropriate reservation of its right to refund should it ultimately prevail in this litigation.

As permitted by the applicable State statutes[8] appellant entered appeals to the Circuit Court No. 2 of Baltimore City, where it renewed its charge that inclusion of its gross receipts from the transportation and handling of imports and exports in the measure of the franchise tax was prohibited by the Import-Export Clause of the Constitution of the United States (R. 33, 36). After a hearing in that court on the record as made before the State Tax Commission (R. 35, 38), the Court wrote an opinion (R. 47) and signed orders (R. 39, 40) sustaining the action of the State Tax Commission. The Court held, after a review of the decisions of the Supreme Court that "it appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its affect on exports or imports or the process of exporting and importing as not to be in contravention of the constitutional cause already mentioned" (R. 53).

Appellant pursued appeals (R. 40, 41) from this decision to the Court of Appeals of Maryland, the highest Court of the State, where it again contended that the inclusion of gross receipts from the transportation and handling of imports and exports in the measure of the gross receipts tax, was a violation of the Import-Export Clause of the Constitution of the United States. As already indicated the Court of Appeals (two of six Judges dissenting) entered its opinion and order (R. 53) holding in substance that the Import-Export Clause is no more prohibitive in effect than

[8] Article 81, Section 194B, of the Annotated Code of Maryland (1939 Edition).

the Commerce Clause, and that "we see no reason why a franchise tax measured by gross receipts including receipts from foreign commerce should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes" (R. 62).

If the Supreme Court decides that appellant's position is correct it will seek refund of $26,024 of its 1946 tax payment (R. 35) and $51,432.47 of its 1947 taxes (R. 38), and of like substantial amounts in succeeding years.[9]

SPECIFICATION OF ERRORS RELIED UPON

Appellant relies upon all of the errors which it has assigned (R. 45-47). For convenience these may be summarized as follows:

(1) Assignments of Error Nos. 1 and 2 (R. 45) express the position of appellant that the Import-Export Clause prohibits the use of gross receipts from the transportation of imports and exports in the measure of a State franchise tax because this amounts to an impost upon imports and exports, which the constitutional clause forbids.

(2) Assignments of Error Nos. 3, 5 and 8 (R. 45-6) set forth appellant's contention that the transportation by railroad of goods in the course of their export journeys *is* the *process* of importing and exporting, *any* State taxation of which is forbidden under the Import-Export Clause as interpreted by this Court.

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[9] Appellant's evidence before the State Tax Commission indicated that the tax refunds would amount to $24,972.62 for 1946 and $53,990.60 for 1947 (R. 10). These amounts were based on mathematical errors which were corrected prior to filing the appeals in the Circuit Court No. 2 of Baltimore City, so that these appeals state the correct amounts. These facts are explained in a stipulated addition to the record in this Court which is not included in the printed record.

(d) Assignments of Error Nos. 4, 6 and 7 (R. 46-6) point out that the Court of Appeals of Maryland failed to recognize the distinction between the prohibitive scope of the Commerce Clause and that of the Import-Export Clause which this Court has pointed out, and therefore it made the mistake of validating the State tax by applying Commerce Clause reasoning to the Import-Export Clause, which is not a permissible means of construing the latter clause.

SUMMARY OF ARGUMENT

1. The Maryland tax cannot be removed from the prohibition of the Import-Export Clause either because it is imposed in lieu of taxes which the State might lawfully impose, or because its form is such that it is not an impost within the language of the constitutional provision. This Court has decided that the prohibition against "any" tax cannot be qualified and it, therefore, necessarily follows that an "in lieu" qualification is not permissible. This Court has also settled that the tax does not have to be directly on the goods to constitute a forbidden impost, but that if it is upon a business of rendering services in connection with imports and exports it is also prohibited. Excise and license taxes and franchise taxes measured by gross receipts, have likewise been held prohibited imposts when levied upon the privilege of engaging in exporting and importing. The Maryland tax is clearly within these definitions of an impost which the Constitution forbids. This leaves as the ultimate question to be decided simply whether the transportation by railroad of goods in the course of importation and exportation is part of the process of importing and exporting.

2. *Brown v. Maryland* determined that in the construction of the Import-Export Clause, the effect of the tax prohibition could not be limited to the goods themselves or to

the time at which they entered or left the country. The cases since have developed the rule that the entire "process" of importing or exporting must be excluded from State or Federal taxation in order to accomplish the purposes of the Import-Export Clause and the closely related Export Clause. The decisions under these clauses appear to turn upon the principle that at least any activity which is essential to the importing or exporting of goods is a part of the process. Transportation of the goods is obviously such an essential, and the various expressions of this Court on the point strongly indicate that it has acepted this as an unquestionable fact.

ARGUMENT

I.

The Maryland Franchise Tax Measured by Gross Receipts, is an Impost Forbidden by Article I, Section 10, Clause 2 of the Constitution When Applied to Gross Receipts from Importing and Exporting.

The opinion of the Court of Appeals of Maryland points out that a succession of Maryland cases has sustained the statutory declaration that the tax involved in this appeal is a franchise tax (R. 56). The Court, following the argument made to it by the State, then goes on to reason that because the tax is imposed in lieu of other State taxes (R. 56), because franchise taxes on gross receipts in lieu of property taxes have been sustained under the Commerce Clause (R. 58), and because it could see no more "prohibitive effect" in the Import-Export Clause than in the Commerce Clause, there is "no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes" (R. 62). By these mental processes it

reached the conclusion that the court below was correct in sustaining the application of the tax to gross receipts from import and export traffic. It might be noticed here that the court of first instance sustained the tax on a different ground, that is, that the railroads are not engaged in the business or process of importing and exporting, but in "an activity which merely assists other persons to engage in the business" (R. 52).

It seems necessary only to refer to *Richfield Oil Corporation v. State Board of Equalization,* (1946) 329 U. S. 69, 91 L. ed. 80 to demonstrate the error of the Court of Appeals' approach to the problem. In that case the Supreme Court of California likewise saw "no greater limitation on the power of the States under Article I, Section 10, Clause 2, than this Court has found to exist under the Commerce Clause." (329 U. S. 69, 74). And in argument it was contended that the Import-Export Clause was designed to prevent discriminatory taxes and not general taxes applicable alike to all goods. This Court rejected both of these positions, pointing out that the Import-Export Clause is cast in terms of a prohibition against taxes, while the Commerce Clause is a limitation upon the power of the scope of which is determined by the Supreme Court. In addition it was emphasized that the Import-Export Clause prohibits "any" State tax on imports or exports, and that this language may not be interpreted to read "any discriminatory" tax.

It, of course, follows quite clearly that although a State tax may be valid under the Commerce Clause because it does not discriminate against interstate commerce, such provides no like reason for sustaining a State tax against the prohibition of the Import-Export Clause. Nevertheless, the court below concluded that because "in lieu" State franchise taxes on gross receipts have been held valid under the Commerce Clause, they are for similar reasons valid

under the Import-Export Clause. If this Court in the *Richfield* case could not "read the prohibtiion against 'any' tax on exports as containing an implied qualification" (329 U. S. 69, 78) which would permit a non-discriminatory State tax, it obviously follows without difficulty that there is no implied qualification which would permit a State to tax imports or exports simply because the tax is in lieu of taxes which the State may impose.

The problem presented by this appeal appears to appellant to be a very simple one which in the final analysis resolves itself into a question of whether or not the transportation by railroad of goods on their import and export journeys is part of the "process" of importing and exporting. If it is, the constitutional prohibition applies because this Court has frequently said it is the "process" of importing and exporting which is removed from the realm of taxation. *United States v. Hvoslef*, (1915) 237 U. S. 1, 59 L. ed. 813; *Thames and Mersey Marine Insurance Co. v. United States*, (1915) 237 U. S. 19, 59 L. ed. 821; *Richfield Oil Corporation v. State Board*, supra; and *Cf. Wilcutts v. Bunn*, (1931) 282 U. S. 216, 228, 75 L. ed. 304.

However, it was argued at length below by the Attorney General of Maryland and will undoubtedly be again urged here, just as it was in the *Richfield* case, that because the Maryland tax is a franchise tax measured by gross receipts it is not an impost, and the constitutional prohibition cannot apply. It is, therefore, necessary to deal briefly with this argument, the answer to which is very clearly furnished by the several cases which are now referred to.

Brown v. Maryland, (1827) 12 Wheat. 419, 6 L. ed. 678, established at the outset of the construction of the Import-Export Clause that the prohibition is not limited to a State tax on the articles of commerce themselves. It will be

recalled that it was here held that the clause prohibited the State of Maryland from exacting a license tax for the privilege of importing goods and selling them in the original bales or packages in which they were imported. The Court in response to the State's argument that the tax was not on the articles, but on the person of the importer said:

> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. * * * It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business [*sic*]. The lawyer, physician or the mechanic must either charge more on the article in which he deals or the thing itself is taxed through his person. This the State has a right to do because no constitutional prohibition extends to it. * * * So a tax on the occupation of an importer is in like manner a tax on importation. * * * This the State has no right to do because it is prohibited by the Constitution." (12 Wheat. 419, 444.)

Cook v. Pennsylvania, (1878) 97 U. S. 566, 24 L. ed. 1015, goes a considerable step further and shows that the prohibition of the Import-Export Clause includes a State tax which is neither on the articles of foreign commerce, nor on the person or business of the importer, but which falls upon the business of a person rendering services in connection with imports and exports. There a Pennsylvania license tax on the privilege of selling goods at auction, and based upon a percentage of the gross proceeds of auction sales, was held unconstitutional under the Import-Export Clause insofar as the proceeds of sales of imported goods in their original packages were included in the measure of the tax. The Court said that "the tax on sales made by an auctioneer is a tax on the goods sold, * * *."

An important additional factor is provided by *Crew-Levick Co. v. Pennsylvania*, (1917) 245 U. S. 292, 62 L. ed. 295, where it was held that a tax measured by the gross receipts from foreign commerce is a tax on that commerce itself and for that reason within the effect of the Import-Export Clause. There the taxpayer objected to a Pennsylvania mercantile license tax based upon the gross receipts of such business to the extent that gross receipts from merchandise sold and shipped from its Pennsylvania warehouse to foreign countries was included in the measure of the tax. This Court relied upon Commerce Clause cases holding that a tax upon the gross receipts from commerce is a tax upon the commerce itself, and said that to this extent there is no difference between interstate and foreign commerce. The Court said of the tax:

> "It operates to lay a direct burden upon every transaction in commerce by withholding for the use of the State a part of every dollar received in such transactions. * * * That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." (245 U. S. 292, 297.)

In *Anglo-Chilean Nitrate Sales Corporation v. Alabama*, (1933) 288 U. S. 218, 77 L. ed. 710, an Alabama franchise tax was held unconstitutional under the Import-Export Clause where the tax was exacted for the privilege of exercising the corporate franchise to conduct foreign commerce, and the measure of the tax was the value of goods imported from abroad.

Finally in *Richfield Oil Corporation v. State Board*, supra, the contested tax was held by the California Supreme Court to be an excise tax levied for the privilege of conducting a retail business and measured by the gross receipts from the sales of that business. This Court said that the question of

the validity of the tax "turns not on the characterization which the State has given the tax, but on its operation and effect." Since the delivery of the oil to the New Zealand vessel at Los Angeles which completed the sale and gave rise to the tax was considered by the Court to be "a step in the export process", the State's argument that the tax was not an impost within the meaning of the Import-Export Clause was rejected.

Applying these decisions to the present case we find that we have a Maryland tax which like *Brown v. Maryland* is not imposed directly on the articles of commerce, but like the tax in *Cook v. Pennsylvania,* is upon the business of rendering services in connection with imported and exported commodities. Like the tax in *Crew-Levick Co. v. Pennsylvania,* it is measured by the gross receipts from foreign commerce and is, therefore, upon the commerce itself, and like the tax in *Anglo-Chilean Nitrate Sales Corp. v. Alabama,* it is a franchise tax which, if transportation of exports and imports is foreign commerce, has been applied to the exercise of a corporate franchise to conduct the business of importing and exporting. And the *Richfield* case tells us that the form of the tax is not of consequence if the activities which give rise to it are a step in the process of importing and exporting.

It is, therefore, perfectly apparent that the application of this Maryland tax to gross receipts from the transportation of imported and exported goods is forbidden by the Import-Export Clause under the foregoing decisions, if the transportation of imports and exports by rail is a part of the business or process of importing and exporting. The fact that the tax is imposed in lieu of some other tax which the State might lawfully impose is not a matter of importance. This argument so much relied upon below and adopted

by the Court of Appeals, comes simply to the fact that, granted the State may impose a property tax or net income tax or some other form of tax, it has not done so, and has chosen instead a tax which, as applied here, is prohibited by the Import-Export Clause. That it might impose without constitutional difficulties a tax of another sort, but in lieu thereof has elected to impose a tax which as applied is prohibited by the Constitution, affords no justification for a construction of the expressly prohibitory language of the Import-Export Clause which would permit such a circumvention of its prohibition.

It seems hardly necessary to point out that the taxation of net income which in *Peck & Co. v. Lowe*, (1918) 247 U. S. 165, 62 L. ed. 1049, and *National Paper & Type Co. v. Bowers*, (1924) 266 U. S. 373, 69 L. ed. 331, was sustained against export clause objections, is obviously not authority for removal of gross receipts taxes from the effect of the Import-Export Clause, although relied on for this purpose by appellees below. In fact the difference between net and gross income taxation was apparently so evident to the Court that *Crew-Levick Co. v. Pennsylvania*, decided at the same term of Court and only a few months before *Peck & Co. v. Lowe*, was not referred to in either case. Professor Powell says that the object of commerce is the acquisition of net income, and in the taxation of net income it is this which is taxed rather than the processes of commerce (60 Harvard Law Review 501, 503). Or it may be said with equal reason, when dealing with the prohibition of the Export and Import-Export Clauses, that the conversion of gross income into net is analogous to the breaking of the original package which removes the articles of commerce from their character as imports or exports.

Similarly, the taxation of capital, although derived from sales of imported goods (*New York v. Wells*, (1908) 208

U. S. 14, 52 L. ed. 370), is as the Court said (208 U. S. 14, 24) merely taxation which *Brown v. Maryland* recognized as permissible after breaking the original packages.

New York ex rel. Parke Davis & Co. v. Roberts, (1898) 171 U. S. 658, 43 L. ed. 323, also much relied on by appellees, sustained a New York State franchise tax measured by capital employed in its business which included both local and foreign commerce. It seems to appellant insofar as this case contains any implication that a State franchise tax on capital may be measured by the value of imported goods in their original packages it is in substance overruled by *Anglo-Chilean Nitrate Sales Co. v. Alabama*, supra. But, however that may be, the latter case says that the decision in *New York ex rel. Parke Davis & Co. v. Roberts*, had no application to a franchise tax measured entirely by the value of imports. It seems, therefore, to be authority only for the proposition that if local business is conducted a State franchise tax measured by capital employed, is not objectionable under the Import-Export Clause if the measure of the tax may be entirely local assets.

Appellees also made considerable reference below (Cf. p. 5) to *Inter-Island Steam Navigation Co. v. Territory of Hawaii*, (1938) 96 Fed. (2d) 412, (affirmed on other grounds in this Court, 305 U. S. 306, 83 L. ed. 189), although the case received no attention from either of the Maryland Courts. It seems probable that the fee which was the subject of dispute in this case, and which was levied by the Territorial Public Utility Commission for support of its investigative and regulatory activities, was in fact an inspection fee permitted by the Import-Export Clause, and this may explain why that objection was not presented on the appeal to this Court. In any event to the extent that the lower Federal Court concluded that the fee measured by gross receipts was not a tax on the privilege of importing and exporting, it

appears to have overlooked *Crew-Levick Co. v. Pennsylvania.* And, of course, in the light of the *Richfield* case, since decided the *Inter-Island* case is no longer an authority.

We now turn to consideration of the problem of whether or not rail transportation of goods in their import and export journeys is a part of the process of importing and exporting.

II.

Transportation by Railroad of Goods in the Course of Importation and Exportation is a part of the Process of Importing and Exporting

The dissenting Judges below had no difficulty with the subject for they say, "Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation" (R. 68). However, the Circuit Court No. 2 of Baltimore City thought otherwise (R. 52), and the Attorney General of Maryland when first considering the problem was uncertain of this Court's views (R. 18).

It appears to appellant that a description of the various activities held by this Court to constitute part of the exporting or importing process leaves no room whatever for doubt that transportation is as much, if not more, a part of the business than the processes which have already been held to be embraced within the business of importing and exporting. In reviewing the cases no distinction is drawn between those decided under the Export Clause[10] and those decided under the Import-Export Clause, since for present purposes they are of like effect. cf. *Richfield Oil Corp. v. State Board of Equalization,* (1946), 329 U. S. 84, 85; 91 L. ed. 80.

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[10] Article I, Section 9, Clause 5 of the Constitution.

When *Brown v. Maryland* was before this Court it was fully recognized that the prohibitory aspect of the Import-Export Clause could not be effectuated by confining its effect to taxes levied directly on goods which are the subject of foreign commerce, or to taxes levied only at the point of time at which the goods enter or leave the country, for as said by Mr. Justice Hughes many years later, "If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it." *United States v. Hvoslef*, (1915) 237 U. S. 1, 13, 59 L. ed. 813. Consequently Chief Justice Marshall concluded that the determination must be "whether the act is within the words *and* mischief of the prohibitory clause." It was, therefore, decided in *Brown v. Maryland* that the prohibition embraced taxes on the business of selling imported goods so long as they remain in their original packages as well as taxes on the goods themselves. Subsequent cases following this reasoning have developed the principle that the clause covers any step in the "process" of importing or exporting, and it appears that the process at least consists of any activity which is *necessary* in order that goods may be imported or exported.

For example, *Almy v. California*, (1861), 65 U. S. 169, 16 L. ed. 644, held that the issuance of an ocean bill of lading was so much a part of the exporting process that a tax on the bill was "in substance the same thing" as a tax on the articles exported. The Court said that this was so because a bill of lading is "necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another." (65 U. S. 169, 174).

In *Fairbank v. United States*, (1901) 181 U. S. 283, 45 L. ed. 862, an agent of the Northern Pacific Railroad issued

an export bill of lading in Minnesota covering an export shipment of wheat. The Court said the bill of lading "evidences the export" and was therefore freed from Federal stamp taxes by the export clause of the Constitution. If the wheat was an export in Minnesota when the bill of lading was issued, obviously the rail transportation thence to the seaport was just as necessary to its exportation as the bill of lading which authorized it to be shipped over the railroad towards the destination which give it an export character.

United States v. Hvoslef, (1915) 237 U. S. 1, 59 L. ed. 813, held that a charter party, a clearly necessary element of securing ocean transportation for goods in the course of being exported, was a part of the "process of exporting".

Insurance, from a business standpoint at least, is a necessary element of import and export trade. In *Thames & Mersey Marine Insurance Co. v. United States*, (1915) 237 U. S. 19, 59 L. ed. 821, it was held that the issuance of insurance policies covering marine risks is part of the exporting process. In this case, the Court speaking through Mr. Justice Hughes said, "It cannot be doubted that insurance during the voyage is, by virtue of the demands of commerce, an integral part of the exportation; the business of the world is conducted upon this basis. * * * Proper insurance during the voyage is one of the necessities of exportation. The rise in rates for insurance as immediately affects exporting as an increase in freight rates" (237 U. S. 19, 26-7). Obviously in making these statements, the Court assumed it to be unquestionable that transportation is the basic process of exportation, and if, as it said, taxation of insurance policies "does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process", there seems no escape from the con-

clusion that transportation is likewise not a preliminary, but is a necessary part of the process.

In *Coe v. Errol,* (1886) 116 U. S. 517, 29 L. ed. 715, the Court sustained against a Commerce Clause objection a New Hampshire tax on logs cut in that State and being held in a river for subsequent transportation to Maine. But in so doing it said that goods are not detached from the general mass of property in the State "until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." (116 U. S. 517, 526). This rule, which has been frequently followed, established definitely that the process of commerce begins when the goods have been committed to a common carrier. Consequently transportation by the common carrier is of necessity a part of the process of commerce and, therefore, of importing and exporting.

In *Spalding & Bros. v. Edwards,* (1923) 262 U. S. 66, 67 L. ed. 865, the Court regarded selling exports as part of the export process.

As already pointed out, *Cook v. Pennsylvania,* (1878) 97 U. S. 566, 24 L. ed. 1015, held that the services of an auctioneer in selling imported goods was sufficiently a part of the importing business to achieve the protection of the Import-Export Clause. Certainly these services were in no sense as necessary to the conduct of the importing business as transportation from the seaport to the point of sale, and this case may therefore indicate that even non-essential services to imported goods belong to the importing or exporting process so long as they constitute part of the normal course of the business.

In *Puget Sound Stevedoring Co. v. Tax Commission,* (1937) 302 U. S. 90, 82 L. ed. 68, the Court felt that steve-

doring services were so obviously a part of foreign commerce that it was prepared to take judicial notice of the fact that this is so. If, as the Court said, "transportation of cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination," it is equally essential that the things to be exported be brought by inland transportation by rail or otherwise to the point where they can be put aboard the ship, and on the other hand it would be futile to put imported goods ashore unless the transportation were available to convey them to their destination.

In *Hooven & Allison v. Evatt,* (1945) 324 U. S. 652, 89 L. ed. 1252, imported hemp which had been transported by rail from New York City to Xenia, Ohio, where it was stored in a warehouse in its original packages, was held by this Court to be still an import. It must necessarily follow that the process of importation continued through the arrival of the hemp in Xenia, and this process obviously was the rail transportation from New York City.

In the *Richfield* case, this Court observed that the delivery of oil by conveying it from the storage tank to the vessel "was a step in the export process." The opinion relates that the start of the process of exportation "may normally be best evidenced by the fact" that the goods "have been delivered to a common carrier for that purpose", but that the delivery from the tank to the vessel was just as clearly the beginning of the export journey as if the oil had "been delivered to a common carrier at an inland point." Just as observed above in discussing the *Thames & Mersey Marine Insurance* case, the assumption is apparent that transportation by a common carrier is an unquestioned step in the export process and therefore also in importing.

Empresa Siderurgica, S. A. et al. v. County of Merced, et al., (1949) 337 U. S. 154, 93 L. ed. 1276, adds emphasis to the significance of transportation as an essential element of exportation because no attempt was made by the local authorities to tax the portions of the dismantled cement plant which had been delivered to a rail carrier for export shipment. In sustaining, against the Import-Export Clause objection, the local tax on the part that had not been shipped, this Court again observed "it is the entrance of the articles into the export stream that marks the start of the process of exportation."

In *Joy Oil Co., Ltd. v. State Tax Commission*, (1949) 337 U. S. 286, 93 L. ed. 1366, this Court finally said explicitly that rail transportation is a part of the process of exportation. In sustaining a Michigan property tax on gasoline stored for fifteen months, although destined for export, the Court held that the long delay deprived the gasoline of the character of an export, notwithstanding the fact, recognized in the opinion by Mr. Justice Frankfurter, that "by the rail shipment to Detroit, one step in the process of exportation had been taken."

Appellant finds particularly significant the separate expression of Mr. Justice Douglas in *Joseph v. Carter & Weekes Stevedoring Co.*, (1947) 330 U. S. 422, 91 L. ed. 993, where the majority of the Court held that because stevedoring "is essentially a part of the commerce itself", a New York City privilege tax measured by the gross receipts from the loading and unloading of imports and exports was a tax upon the business itself and, therefore, invalid. While the majority decided the case under the Commerce Clause, Mr. Justice Douglas (joined by Mr. Justice Rutledge) thought that the tax was invalid only under the Import-Export Clause. His expression on this point fully sustains this appeal because he holds that a tax measured

by the gross receipts from transportation of imported and exported goods, which is the essential nature of stevedoring services (330 U. S. 422, 427), is prohibited by the Import-Export Clause. His opinion on this point follows:

> "Second. I think the tax is unconstitutional insofar as it reaches the gross receipts from loading and unloading vessels engaged in foreign commerce. Such a tax is repugnant to Article I, Section 10, Clause 2, of the Constitution which provides that 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws * * *'
>
> "*Loading and unloading are a part of the 'exporting process' which the Import-Export Clause protects from state taxation.* See Thames & Mersey M. Ins., Co. v. United States, 237 U. S. 19, 27, 59 L. ed. 821, 824, 35 S. Ct. 496, Ann Cas 1915 D. 1087. Activity which is a 'step in exportation' has that immunity. A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 68, 67 L. ed. 865, 867, 43 S Ct 485. As the Court says, loading and unloading are 'a continuation of the transportation.' Indeed, the commencement of exportation would occur no later. See Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 91 L. ed. 80, 67 S Ct 156. And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident 'which gave rise to the accrual of the tax was a step in the export process.' Richfield Oil Corp. v. State Bd. of Equalization, supra.
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> "As we pointed out in that case, the Commerce Clause and the Import-Export Clause 'though complementary, serve different ends.' 329 U. S. p. 76, 91 L. ed. 89, 67 S. Ct. 156. Since the Commerce Clause does not expressly forbid any tax, the Court has been free to balance local and national interests. Taxes designed to make inter-state commerce bear a fair share of the cost of local government from which it receives bene-

fits have been upheld; taxes which discriminate against interstate commerce, which impose a levy for the privilege of doing it, or which place an undue burden on it have been invalidated. *But the Import-Export Clause is written in terms which admit of no exception but the single one it contains.* Accordingly a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause. For me the present tax is a good example." (our Italics) (330 U. S. 422, 444).

This discussion should probably not be concluded without reference to *Texas & New Orleans Railroad Co. v. Sabine Tram Co.*, (1913) 227 U. S. 11, 57 L. ed. 442, and *Railroad Commission of Louisiana v. Texas & Pacific Railway Co.*, (1913) 229 U. S. 335, 57 L. ed. 1215, where this Court held that for the intrastate rail transportation of goods in the course of their export journey to the seaport and thence to a foreign destination, the railroads were entitled to charge the rate applicable to foreign commerce. It is a necessary element of these decisions that the rail transportation was considered a part of the exporting process, otherwise the export rate could not have been applied.

Reference should also be made to the fact that the Attorney General of the United States ruled that the World War I Federal excise tax on the transportation of goods was not applicable to exports because of the prohibition contained in the export clause, basing his opinion principally upon the *Thames & Mersey Marine Insurance Company* case. See 31 Opinions U. S. Attorney General 329. The regulations of the Treasury Department governing the application of the present Federal transportation tax contains a similiar prohibition against the collection of the tax on property in the course of export and significantly says "property will be considered to be in the course of exporta-

tion from the time of delivery to a carrier in the United States for transportation by continuous movement to a point beyond the boundaries of the United States." (Treasury Regulations 113, Section 143.30, published in 494 CCH, Paragraph 2766C).

In the light of the foregoing decisions it is difficult to understand how Judge Sherbow in the Circuit Court No. 2 of Baltimore City could have come to the conclusion that the Maryland tax "is an impost not upon the business or process of importing and exporting but upon an activity which merely assists other persons to engage in that business." This seems directly contrary to *Cook v. Pennsylvania*, supra, and is obviously at variance with the *Thames & Mersey Marine Insurance Co.* case, and with Mr. Justice Douglas' expression in the *Joseph v. Carter & Weekes* case. It is also difficult to understand the uncertainty of the Attorney General of Maryland on the subject. Perhaps we may infer from the method by which the majority of the Court of Appeals sustained the tax, that they, at least, were certain that transportation of imports and exports is necessarily a part of the process of importing and exporting, and therefore the only other way of evading the constitutional provision was by the "in lieu" argument which the Court adopted.

In the court below, the Attorney General of Maryland contended at some length that the tax can not be prohibited by the Import-Export Clause because it is measured by gross receipts derived from transportation performed on goods which have been imported, or before they are exported. It is hard to see how such a contention is admissible in the light of the cases hitherto referred to, particularly *Coe v. Errol* and *Fairbank v. United States*. However, this very line of reasoning was examined by Chief Justice Marshall in *Brown v. Maryland* and rejected.

"* * * Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

"If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited." (12 Wheat. 419, 438).

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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